

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Implementation of the Subscriber Carrier )  
Selection Changes Provisions of the )  
Telecommunications Act of 1996 )  
)  
Policies and Rules Concerning )  
Unauthorized Changes of Consumers' )  
Long Distance Carriers )

CC Docket No. 94-129

**REPLY COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY,  
PACIFIC BELL, AND NEVADA BELL**

Southwestern Bell Telephone Company (SWBT), Pacific Bell (Pacific) and Nevada Bell (Nevada), jointly "the SBC Companies", submit these Reply Comments on the Commission's Further Notice of Proposed Rulemaking (FNPRM) on the issue of slamming.

**I. THE SBC COMPANIES THREE STRIKES PROPOSAL WILL DETER FUTURE SLAMMING**

The SBC Companies urge the adoption of the "Three Strikes and You're Out" proposal to deter future slamming. It is essential to remove the economic incentive to engage in slamming by penalizing telecommunications carriers with repeated slamming violations. The SBC Companies' Three Strikes proposal is a reasoned approach to hold carriers accountable for their actions.

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## **II. THE COMMISSION'S ANTI-SLAMMING RULES SHOULD APPLY TO ALL LANDLINE TELECOMMUNICATIONS CARRIERS**

None of the commenting parties opposed the Commission's proposal to expand the anti-slamming rules to apply to all landline telecommunications carriers. Thus, the rules should be expanded to include all landline telecommunications carriers, including local, intraLATA toll, and interLATA service providers. Many parties noted that the proposed expansion would be applicable only to landline carriers and would not apply to wireless providers.<sup>1</sup>

## **III. ALL AUTHORIZED CARRIERS SHOULD BE SUBJECT TO THE SAME RULES**

The Commission asks whether additional requirements are necessary for incumbent LECs (ILECs) because of any advantages arising from their incumbency. In these circumstances, there are no advantages arising from incumbency that would make it necessary or appropriate to impose additional rules upon ILECs. The traditional concept of incumbency does not apply because the potential for slamming abuses bears no relationship to ILECs' ownership of physical networks. Thus, ILECs possess no potential anti-competitive advantages over other incumbent authorized carriers. Therefore, no additional rules are necessary and all authorized carriers, including ILECs, should be subject to the same anti-slamming requirements.<sup>2</sup>

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<sup>1</sup>Airtouch Comments, pgs. 2-4; Bell Atlantic Mobile Comments, pgs. 1-2, 11-12; 360° Comments, pgs. 6-8.

<sup>2</sup>New York State Consumer Protection Board (NYSCPB) Comments, p., 20; New York Department of Public Service (NYDPS) Comments, p. 5; Virginia State Corporation Commission (Virginia) Comments, p. 5; Ameritech Comments, p. 15; Bell Atlantic Comments, p. 6; BellSouth Comments, p. 8-9; Cincinnati Bell Telephone (CBT) Comments, p. 7-8; GTE Comments, p. 9-10; North Carolina Utilities Commission Comments, p. 4; USTA Comments, page 3.

If the Commission imposes additional requirements, the expense associated with those requirements will be borne by end users. It is not in the public interest to increase costs upon end users by singling out one category of providers and imposing unnecessary, additional requirements. In short, all rules must apply equally to all providers.

#### **IV. VERIFICATION RULES SHOULD NOT APPLY TO IN-BOUND CALLS**

It is not necessary or effective to verify in-bound calls to change PCs. Application of additional verification rules would impose unwarranted burdens on carriers and consumers.<sup>3</sup> Each time a customer called in to change a PC, he would be subject to a potentially long and laborious process. In addition, because by definition in-bound calls are initiated by the customer, these calls are essentially self-verified. Thus, as noted by the United States Telephone Association (USTA), application of verification rules to a customer who affirmatively acts on his own motion to switch carriers seems excessive.<sup>4</sup> If such additional verification rules are implemented, however, they must apply equally to all providers.

#### **V. PC VERIFICATION PROCEDURES SHOULD NOT BE EXTENDED TO PC FREEZE SOLICITATIONS**

PC verification procedures should not be extended to PC freeze solicitations. PC protection was developed solely as a customer safeguard to protect against further slamming. The SBC Companies have never marketed or charged for PC protection -- it is provided only

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<sup>3</sup>AT&T Comments, p. 21; BellSouth Comments, p. 11; CBT Comments, p. 7; DMA Comments, pgs. 2-3; RCN Comments, pgs. 4-5; Sprint Comments, p. 30; 360° Comments, p. 6; USTA Comments, pgs. 4-5.

<sup>4</sup>USTA Comments, pgs. 4-5.

when specifically requested by the customer. Thus, the SBC Companies agree that solicitation of PC protection should be prohibited. Brittan Communications International Corporation (BCI) is incorrect when it suggests that verification is needed to protect against unauthorized changes by other telecommunications carriers because only a customer can change a PC restriction.<sup>5</sup>

When the Commission implements a comprehensive anti-slamming campaign, such as proposed in SBC's Three Strikes approach, the need for PC protection will be eliminated.

#### **VI. CARRIERS GUILTY OF SLAMMING SHOULD BE SUBJECT TO SWIFT, SEVERE PENALTIES**

The SBC Companies urge the adoption of the Three Strikes approach with increasing penalties as violations continue. By removing the adoption of the economic incentive to slam, coupled with swift, severe penalties, this approach will work to eliminate slamming. The SBC Companies agree with the majority of commentators that indicate that the unauthorized carrier must reimburse the authorized carrier and/or the customer who has been slammed in order to make slamming victims whole.<sup>6</sup> Moreover, and as stated earlier, the SBC Companies submit that the impacted LEC should also be made whole for expenses associated with restoral of the customer's service to the original carrier of choice.

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<sup>5</sup>BCI Comments, p. 10.

<sup>6</sup>AT&T Comments, pgs. 15-16; BCI Comments, p. 13; CBT Comments, p. 6; NYSCPB Comments, pgs. 10-11; Public Utility Commission Texas (PUCT) Comments, p. 6; USTA Comments, p. 11.

**VII. SUBSCRIBERS VICTIMIZED BY SLAMMING SHOULD BE PLACED IN THE SAME POSITION THEY WOULD HAVE BEEN IN HAD THE SLAMMING NOT OCCURRED**

The SBC Companies agree with the commentators who propose that a subscriber who has been slammed should be required to pay the appropriate charges as if the slam had not occurred.<sup>7</sup> Some parties propose that the subscriber should be absolved of all charges for a short period of time.<sup>8</sup> We do not agree. Absolution would give the subscriber an undue windfall. Others suggest exactly the opposite -- that there should be no absolution for unpaid charges.<sup>9</sup> This approach is also inequitable as it unfairly penalizes the slamming victim. We believe the slammed subscribers should be placed in the exact monetary position they would have been in had the slam not occurred. This measure of damages gives them the benefit of the bargains they struck with their authorized carriers without an undue windfall or an unfair penalty.

**VIII. ACTA IS WRONG CONCERNING THE ENFORCEABILITY AND CONSTITUTIONALITY OF ANTI-SLAMMING RULES**

ACTA argues that the Commission cannot lawfully enforce its proposed anti-slamming rules. ACTA's arguments are based on three fundamentally flawed premises. First, ACTA asserts that the definition of slamming is too vague to create a punishable offense.<sup>10</sup> Second, ACTA asserts that enforcement of the Commission's rules against slamming would be based

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<sup>7</sup>Bell Atlantic Comments, p. 3; CBT Comments, p. 6.

<sup>8</sup>NYSCP Comments, p. 9; BellSouth Comments, page 13; Atty Generals Comments, p. 5; NYDPS Comments p. 4; Virginia Comments, pgs. 3-4.

<sup>9</sup> ACTA Comments, p. 17; BCI Comments, p. 13; PUCT Comments, p. 6.

<sup>10</sup> ACTA at ii, 9, 11, 12, 13, 16.

on mere allegations by subscribers against carriers.<sup>11</sup> Third, ACTA asserts that in order to penalize slammers the Commission must find *mens rea* (a guilty mind; a guilty or wrongful purpose; a criminal intent).<sup>12</sup> Based on these flawed premises, ACTA incorrectly concludes that the Commission's enforcement of its proposed slamming rules would raise constitutional concerns involving due process, equal protection, the taking of property, and free speech.<sup>13</sup> We briefly discuss ACTA's mistaken premises below. We show that the Commission's proposed rules, when adjusted based on our proposals, not only will avoid the problems that ACTA describes but also will protect customers and competition.

First, contrary to ACTA's assertions, the definition of the slamming offense is clear and concrete. Section 258 of the Telecommunications Act states: "No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." Thus, the offense is defined as violating the described verification procedures which the Commission is to prescribe. The Commission's verification procedures in Sections 64.100 and 64.1150 of its rules<sup>14</sup> are clear and detailed. With (1) the expansion of the verification procedures to all landline carriers and (2) the adoption of the definition of "subscriber" that we have recommended, the slamming violation will be defined in a manner that puts all parties on notice of what is required to avoid the violation.

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<sup>11</sup> Id at ii, 4, 9, 18.

<sup>12</sup> Id. at ii, 13, 14.

<sup>13</sup> Id. at 9, 15, 17.

<sup>14</sup> 47 C.F.R. 64.1100 and 64.1150.

Second, because the Commission has clear verification procedures, enforcement need not, and should not, be based solely on subscribers' allegations against carriers. We explained in our comments that the "first strike" against slammers "will occur when more than 2 percent of a carrier's service orders for PC changes are disputed in any given month, and the carrier is unable or chooses not to produce valid evidence of customer authorization for changing the PC."<sup>15</sup> Thus, more than subscribers' allegations are required for this enforcement.

Additionally, it should be noted that for all PC changes, regardless of whether the submitting carrier is above or below the proposed threshold, the carrier should be prepared to produce upon request valid evidence of customer authorization. Following the Commission's verification procedures provides concrete evidence of customer authorization for the change in service providers, with one exception. That one exception is the "welcome package" alternative, which the Commission has proposed removing. We, but not ACTA, support that removal.

Third, there is no requirement to find wrongful intent in order to penalize slammers. Section 503 of the Communications Act establishes liability for a forfeiture penalty upon any person that "willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act..."<sup>16</sup> The Commission has previously found that "willfully" under this section does not require any intent to violate the Act or the Commission's Rules.<sup>17</sup> The Commission found:

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<sup>15</sup> Comments by SWBT, Pacific Bell, and Nevada Bell at 4 (emphasis added).

<sup>16</sup> 47 U.S.C. Section 503(b)(1)(B) (emphasis added).

<sup>17</sup> Private Land Mobile Station WSM 534, NAL/Acct. No. 315NF016, Order, 9 FCC Rcd No. 7, 1647 (1994).

“[W]illfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question as opposed to being accidental (such as brushing against a power switch turning on a radio transmitter). Furthermore, to establish a willful violation, it is not necessary to show that a person knew that he was acting wrongfully.... A violation, moreover, resulting from an inadvertent mistake or a failure to become familiar with the FCC’s requirements is considered a willful violation.”<sup>18</sup> Therefore, contrary to ACTA’s assertions, failure to comply with the Commission’s PC change verification rules can justify forfeiture penalties. Moreover, even the first strike of our “three-strikes” proposal is based on repeated violations of the rules, and Section 503 subjects those who have “repeatedly failed to comply” to forfeiture penalties.

In addition, our “three-strikes” proposal is not aimed primarily at punishing violators but at eliminating violations. Accordingly, our proposed fines per violation are significantly lower than the \$100,000 per violation allowed by the statute and significantly lower than the Commission’s base amount of \$75,000 per violation for a Section 503 forfeiture based on “[u]nauthorized conversion of long distance telephone service.”<sup>19</sup> Our “three-strikes” proposal is a graduated approach designed to remove the economic incentives for repeated slamming activity and, where reimbursement and penalties alone are not enough, to eliminate slamming by moving slammers in three steps from probation to the suspension of the right to make PC changes.

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<sup>18</sup> Id. at 1648.

<sup>19</sup> Standards For Assessing Forfeitures, Policy Statement, 8 FCC Rcd No. 18, 6215, 6217 (1993).



Therefore, the Commission's proposed rules, adjusted in accordance with our recommendations, will serve the public interest by protecting customers and competition from slamming. In addition, because ACTA's premises concerning the rules are wrong, none of the constitutional concerns that ACTA mentions are raised. Due process is protected by providing clear notice of what is required for an authorized PC change and allowing carriers to show that they have met the requirements. Equal protection is provided by applying the new rules evenly to all landline carriers. Property is not wrongfully taken; legitimate fines are to be assessed for violations of the Communications Act and the Commission's Rules.

Finally, free speech is protected. The Commission was careful to avoid prohibiting commercial speech, in the form of advertising and marketing efforts, when it created its PIC-change authorization rules. The Commission pointed out that its rules "do not prohibit any speech, commercial or otherwise. They merely require that the carriers' method of delivery of that speech not confuse or mislead the consumer."<sup>20</sup> The Commission explained: "We are not proposing to restrict IXCs' use of their promotional materials, but merely are specifying that they be separate or severable from the actual document that authorizes a PIC change."<sup>21</sup> Accordingly, expanding the application of this rule to all landline carriers will not prohibit any speech, and ACTA's assertions are without merit.

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<sup>20</sup> Policies and Rules Concerning Unauthorized changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, Report and Order, released June 14, 1995, para. 15.

<sup>21</sup> *Id.* at para. 18.

# **IX. CONCLUSION**

For all the reasons set forth herein, the SBC Companies respectfully request that the Commission enter an order adopting the recommendations of the reply comments set forth herein and specifically the proposed three-strikes approach. We believe the SBC Companies' proposed three-strikes approach will eliminate slamming, promote greater customer satisfaction and serve the public interest.

Respectfully submitted,

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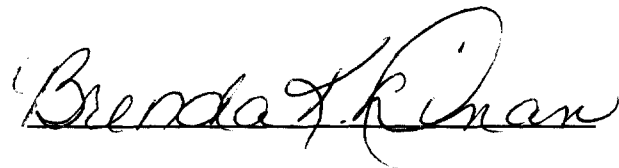
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**CERTIFICATE OF SERVICE**

I, Brenda K. Dinan, hereby certify that the Reply Comments of Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell, on CC Docket No. 94-129, has been served September 29, 1997, to the Parties of Record.

A handwritten signature in cursive script that reads "Brenda K. Dinan". The signature is written in dark ink and is positioned above the printed name.

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